Supreme Court, U.S.
FILED
MAY 4 1995
OFFICE OF THE CLERK

No. 94-1567

In The

Supreme Court of the United States

October Term, 1994

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Petitioner,

v.

THE YAKIMA INDIAN NATION, THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, THE NEZ PERCE TRIBE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NEZ PERCE TRIBE AND CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON IN OPPOSITION TO COLVILLE'S PETITION FOR WRIT OF CERTIORARI

DOUGLAS NASH
Office of Legal Counsel
P.O. Box 305
Lapwai, Idaho 83540
(208) 843-7355

Attorney for Respondent Nez Perce Tribe

HOWARD G. ARNETT
KARNOPP, PETERSEN, NOTEBOOM, HUBEL, HANSEN & ARNETT
Riverpointe One
1201 N.W. Wall Street, Suite 300
Bend, Oregon 97701-1936
(503) 382-3011

Attorney for Respondent Confederated Tribes and Bands of the Warm Springs Reservation of Oregon

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether an Indian tribe that is not a party to any treaty is entitled to exercise off-reservation fishing rights reserved by two other Indian tribes in treaties with the United States because some members of the non-treaty tribe have ancestors who were members of the treaty tribes?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THIS CASE DOES NOT MEET ANY OF THE CRITERIA THAT TRADITIONALLY JUSTIFY DISCRETIONARY REVIEW BY THIS COURT ... 4

A. The facts and issues in this case limit its significance to the parties involved 4

B. The decisions of the district and circuit courts below are not inconsistent with any prior decision of this Court 6

C. Review of this decision will be of no instructive value to lower courts 9

COLVILLE MISCHARACTERIZES AND MISREPRESENTS THE HOLDINGS OF THE COURTS BELOW 10

A. The Issue presented by Colville's Motion to Intervene was whether Colville was a successor in interest to rights under the Yakima and Nez Perce treaties and the District and Circuit Courts both ruled squarely on that issue 11

B. Colville's issue statement invites this Court to make an erroneous factual assumption .. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 4

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 4

The Confederated Tribes of the Colville Reservation as Representative of the Joseph Band of the Nez Perce Tribe v. The United States, 25 Indian Claims Commission 99, Docket No. 196 (1971) 16

United States v. Oregon, 122 F.R.D. 571 (D. Ore. 1988) 2

United States v. Oregon, 302 F.Supp. 899 (D. Ore. 1969) 1, 2

United States v. Oregon, 529 F.2d 570 (9th Cir. 1976) 2

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981) 2

United States v. Oregon, 666 F.Supp. 1461 (D. Ore. 1987) 2

United States v. Oregon, 699 F.Supp. 1456 (D. Ore. 1988) 2

United States v. Oregon, 718 F.2d 299 (9th Cir. 1983) 2

United States v. Oregon, 745 F.2d. 550 (9th Cir. 1984) 2

United States v. Oregon, 769 F.2d 1410 (9th Cir. 1985) 2

United States v. Oregon, 913 F.2d 576 (9th Cir. 1990) 2

United States v. Suquamish Indian Tribe, 901 F.2d 772 (9th Cir. 1990) 8, 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974) 5, 9

United States v. Washington, 476 F.Supp. 1101 (W.D. Wash. 1979) 5, 13

United States v. Washington, 520 F.2d 676 (9th Cir. 1975) 5, 8, 9

United States v. Washington, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1142, 1025 S.Ct. 1001, 71 L.Ed.2d 294 (1982) 8, 9, 17

United States v. Washington, 626 F.Supp. 1405 (W.D. Wash. 1985) 6

W.W. Wolverton v. United States, 29 Ct. Cl. 107 (1984) 16

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) ... 6, 8

OTHER AUTHORITIES

13 Moore's Federal Practice § 810.45 8

Treaty of June 9, 1855, 12 Stat. 951 1

Treaty of June 11, 1855, 12 Stat. 957 1

Treaty of June 25, 1855, 12 Stat. 963 6

STATEMENT OF THE CASE

In 1855, the United States entered into treaties with the Yakima Nation, Treaty of June 9, 1855, 12 Stat. 951, Petition, Appendix E, pp. 68a - 75a,[1] and Nez Perce Tribe, Treaty of June 11, 1855, 12 Stat. 957, Petition, Appendix F, pp. 76a - 83a. In Article III of these treaties, the Yakima and Nez Perce tribes specifically and expressly reserved the right to fish at all of their "usual and accustomed [fishing] places" outside their reservations. *Id.* From that time to the present, these tribal entities have continued to exercise, regulate and protect their treaty reserved rights to fish. Petition, Appendix C, pp. 41a - 44a.

This case, *United States v. Oregon*, Civ. No. 68-513-MA, was originally brought in 1968 by "the United States on its own behalf and on behalf of the Confederated Tribes and Bands of the Yakima Reservation, the Confederated Tribes and Bands of the Umatilla Reservation . . . , the Nez Perce Indian Tribe and 'all other tribes similarly situated . . . ' " *United States v. Oregon*, 302 F.Supp. 899, 904 (D. Or. 1969). The Warm Springs, Yakima, Umatilla and Nez Perce tribes all sought, and were granted, permission to intervene on their own behalf. *Id.* "Following the intervention of the Warm Springs Tribe and upon the inability of government counsel to identify any other tribes who were 'similarly situated,' the State's motion to

---

[1] Copies of the Yakima and Nez Perce Treaties, the opinions of the District Court and Court of Appeals, and other orders and documents were attached as appendices to Colville's Petition for a Writ of Certiorari. Citations to those documents in this brief are to the appendix designation of those documents and their page number in the Petition.

strike the reference to such other tribes was granted." *Id.* All four of the intervening tribes were parties to treaties with the United States which contain "substantially identical" provisions reserving off reservation fishing rights. *Id.* The purpose of this case was to define the nature and extent of those treaty reserved fishing rights in the Columbia River. *Id.* at 903-4. This case has been under the continuing jurisdiction of the court since the first opinion was rendered in 1969.[2] Since that time, numerous issues have been adjudicated by the district court and Ninth Circuit.[3]

The Confederated Tribes of the Colville Reservation was established as a tribal entity by the 1938 confederation of eleven different tribes, bands and groups that were located on the Colville Reservation. Petition, Appendix C, pp. 28a - 29a. The Confederated Tribes of the Colville Reservation has never been a party to a treaty with the United States. The Colville Indian Reservation was created "for certain bands of Indians in Washington Territory *not parties to any treaty*." Petition, Appendix G,

---

[2] A historical background of this case since that time is contained in the District Court's opinion reported at 122 F.R.D. 571 (D. Ore. 1988).

[3] Reported decisions include the following: 529 F.2d 570 (9th Cir. 1976); 657 F.2d 1009 (9th Cir. 1981); 718 F.2d 299 (9th Cir. 1983); 745 F.2d. 550 (9th Cir. 1984); 769 F.2d 1410 (9th Cir. 1985); 666 F.Supp. 1461 (D. Ore. 1987); 699 F.Supp. 1456 (D. Ore. 1988); 122 F.R.D. 571 (D. Ore. 1988); 913 F.2d 576 (9th Cir. 1990). In addition, the District Court docket sheet reflects the multitude of unpublished orders that have been rendered over the 26 year history of this case.

pp. 86a - 87a, emphasis supplied. Colville's first involvement in Columbia River treaty fishing issues occurred in 1989 when it filed its motion to intervene in this case claiming to be a successor in interest to rights under the Yakima and Nez Perce treaties. "Colville has not explained why it waited over twenty years after *United States v. Oregon* was initiated" to seek intervention. Petition, Appendix A, p. 3a.

After trial, District Court Judge Marsh made extensive findings of fact and conclusions of law and in his March 16, 1992, opinion, held that Colville had failed to establish that it was the successor to, and present day holder of, rights reserved in the 1855 Yakima and Nez Perce treaties. Petition, Appendix C, pp. 15a - 44a. Colville appealed to the Ninth Circuit Court of Appeals where the decision of the district court was affirmed in an opinion dated June 23, 1994. Petition, Appendix A, pp. 1a - 12a. Thereafter, Colville filed a petition for rehearing with a suggestion for rehearing en banc. The petition was denied and the suggestion for rehearing en banc was rejected by order of the court filed December 23, 1994. Petition, Appendix D, pp. 66a - 67a. Shortly thereafter, on December 28, 1994, the Ninth Circuit entered an order amending its opinion in two respects. Petition, Appendix B, pp. 13a -14a. Colville now seeks review by this Court.

SUMMARY OF ARGUMENT

This case is premised upon complex facts which are unique and specific to the parties. Moreover, the legal issue, which is directly tied to those facts, is likely to have

no application beyond this case. Contrary to Colville's characterization of the issues, the decisions of the courts below are not in conflict with any decisions of this Court. Consequently, Colville's petition does not meet any of the criteria which support granting a petition for writ of certiorari.

ARGUMENT

THIS CASE DOES NOT MEET ANY OF THE CRITERIA THAT TRADITIONALLY JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

The rules and decisions of this Court define those instances in which petitions for writs of certiorari are typically granted. This case meets none of those criteria.

A. The facts and issues in this case limit its significance to the parties involved.

By rule of this Court, "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10, Rules of the Supreme Court of the United States. The concept of importance in this context means the importance of the issues "to the public as distinguished from" importance to the parties to the case. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). In addition, this Court has held that to warrant review, the problem must be "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Neither of these criteria are met here.

The legal issue presented to the district court by Colville was aptly characterized by the court as "unique." Petition, Appendix C, p. 39. In attempting to establish itself as a treaty tribe, Colville forged an "amalgam of arguments" from determinations of treaty tribe status in several other cases contending that its constituent tribes were distinct tribal entities which had also merged into the Colville Confederacy - an argument the district court found "becomes inconsistent with itself." Petition, Appendix C, p. 40a. Colville's amalgam of theories was necessitated by the fact that no previous case had ever involved the type, number and interrelationships of parties as are involved here. Indeed, the prospect of any future litigation over treaty tribe status is extremely unlikely at this point in time because that determination was most obviously made at the time treaties were executed and a number of truly ambiguous situations were resolved in *United States v. Washington*. *See, e.g.*, 384 F.Supp. 312 (W.D. Wash. 1974); 520 F.2d 676 (9th Cir. 1975); 476 F.Supp. 1101 (W.D. Wash. 1979). While the legal issue in this case is of monumental significance to the parties, its application is limited by the unique facts upon which it is premised. Consequently, it does not rise to the level of importance defined for purposes of review by this Court.

The facts in this case defy duplication. Four Indian tribes are active parties in this proceeding. The Confederated Tribes of the Colville Reservation is comprised of eleven different tribes, bands and groups. Petition, Appendix C, p. 29a. The Confederated Tribes and Bands of the Yakima Indian Nation is comprised of some 14 different Indian tribes and bands. Petition, Appendix C,

p. 16a. The Confederated Tribes of the Warm Springs Reservation of Oregon is the successor in interest to seven tribes and bands that were signatory to the Treaty with the Tribes of Middle Oregon of June 25, 1855. 12 Stat. 963. The Nez Perce Tribe and each of the tribes, bands and groups of Indians that are part of the Yakima, Warm Springs and Colville Confederations have their own unique histories and cultures. In addition, each has a differing history of relationships with the United States and with each other as is aptly demonstrated by the facts agreed to and found by the district court. Petition, Appendix C, pp. 22a - 30a, 45a - 65a. The nature of the facts here limits the application of the decisions below to the parties here.

Colville's petition does not meet the criteria established by Rule 10 and the decisions of this Court for granting petitions for writs of certiorari because the mostly historical facts in this case are limited to the present parties, the legal issue involved is tied directly to those facts and its application beyond the present parties is extremely unlikely.

B. The decisions of the district and circuit courts below are not inconsistent with any prior decision of this Court.

Colville attempts to persuade this Court that the lower courts' decisions in this case conflict with this Court's holding in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) and with subsequent lower court decisions in *United States v. Washington*, 626 F.Supp. 1405 (W.D. Wash. 1985),

pertaining to the rights of tribes who move to reservations other than ones established in their respective treaties. Petition, pp. 5 - 7. The most casual examination reveals multiple flaws in this argument.

First, the decisions of the courts below in this case did not involve the loss of treaty rights caused by a treaty tribe's failure to move to the reservation established in its treaty. This is Colville's incorrect and misleading statement of the issue. See also, discussion in Statement of the Case in Yakima's Brief in Opposition. The decisions of the courts below in this case were based solely upon Colville's failure to establish treaty tribe status in accordance with the test it presented to the district court.

Second, the status of all tribal entities in *United States v. Washington* as treaty tribes has been finally decided. Nothing in the decisions below in this case is inconsistent with the analysis of successor in interest claims made in *United States v. Washington*, nor are the decisions below grounds for disrupting issues litigated and resolved years ago in *United States v. Washington*.

Third, while some of the tribes in *United States v. Washington* did go to reservations other than the one created in their respective treaties, that factual background is vastly different than the one in this case. *United States v. Washington* did not involve situations where, as here, a non-treaty tribe claims to be entitled to treaty rights of another tribe because some individuals from treaty tribes moved to the reservation of the non-treaty tribe and became members of the non-treaty tribe.

Finally, in contending that the decisions of the lower courts in this case conflict with rulings in *United States v.*

Washington, Colville is arguing that the Ninth Circuit is in conflict with itself. The Ninth Circuit heard the appeals from the district court in *United States v. Washington*, including the ones relied upon by Colville here. *See*, Petition, p. 6, citing 520 F.2d 676 (9th Cir. 1975).[4] The Ninth Circuit also heard Colville's appeal in this case and affirmed the district court's decision, Petition, Appendix A, p. 12a, which was premised almost exclusively upon Ninth Circuit precedent. Petition, Appendix C, pp. 30a - 39a. In addition, the Ninth Circuit considered and rejected Colville's petition for rehearing in this case and no judge of the court requested a vote on Colville's suggestion for rehearing en banc. Petition, Appendix D, pp. 66a - 67a.

Colville's assertion that the decisions in this case conflict with a previous decision of this Court is totally without substance. "The mere assertion of conflict with Supreme Court precedent will not suffice" for purposes of securing review upon a petition for a writ of certiorari. 13 Moore's Federal Practice § 810.45. "Rule 10 requires that the application of the precedent to the case at bar be clear." *Id.* The comparison of this case with *Passenger Fishing Vessel, supra*, demonstrates that the cases are factually distinct, are not inconsistent and that Colville has done nothing more than claim that a conflict exists. Colville's claim that the decisions below place portions of the decisions in *United States v. Washington* "in jeopardy," Petition, p. 7, is spurious and should be rejected.

---

[4] Since the denial of certiorari in *U.S. v. Washington*, 641 F.2d 1368 (9th Cir. 1982), the Ninth Circuit has decided another case using the established case law of the circuit. *United States v. Suquamish Tribe*, 901 F.2d 772 (9th Cir. 1990).

C. Review of this decision will be of no instructive value to lower courts.

This case involves fishing rights held only by Indian Tribes who are parties to treaties negotiated by Isaac I. Stevens as Washington Territorial Governor. *See*, discussion of Stevens Treaty process in *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) and *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975). All tribes party to Stevens's treaties are located within the Ninth Circuit. As noted at footnote 4 above, the Ninth Circuit, over a period of nearly 20 years has developed a body of law dealing with this unique issue. No other circuit will have any occasion to deal with this question.

This Court has previously been asked to review the Ninth Circuit resolution of this area of the law and has declined to do so. *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1142, 1025 S.Ct. 1001, 71 L.Ed.2d 294 (1982). Colville makes no argument that discusses the previous denial of certiorari, even though Colville's present counsel was also counsel for Petitioner in that case. Colville makes no argument and presents no theory as to why this Court should change the position it took on this issue in 1982. The tribes herein submit there is no basis for a change in this position.

Further, and of equal importance, Colville does not challenge the law of the Ninth Circuit as to the test for determining treaty tribe status. Review by this Court of Colville's argument would do nothing to alter the established law of the Circuit, which this Court has already let stand in *United States v. Washington, Id.* Colville here, simply challenges the manner in which the Circuit

applied its own law in dealing with a factual determination by the trial court. Accordingly, there is absolutely no precedential or instructive value to be gained by a review of this case by this Court.

The rules and decisions of this Court have defined the grounds that will justify discretionary review by this Court. No such grounds are presented in Colville's petition here. Colville's petition should therefore be denied.

COLVILLE MISCHARACTERIZES AND MISREPRESENTS THE HOLDINGS OF THE COURTS BELOW

In its petition to this Court, Colville asserts that one of the questions "wrongly decided" by the Court of Appeals which requires review by this Court is:

> [w]hether Indian tribes which are signatories to a treaty with the United States lose their treaty-protected off-reservation fishing rights, *sub silentio*, by failing to move to the reservation created by the treaty.

Petition, p. 5.

This is not a position argued by any of the respondent tribes in either of the courts below nor is it a holding of either of those courts.[5] It is a fabrication by Colville for

---

[5] The same is true of Colville's argument that the Court of Appeals failed to follow the rule that treaty rights, once vested, can be abrogated only by clear Congressional action. Petition, p. 7-9. This argument is true as it applies to tribal entities, however, it ignores the fact that individuals can become divested of treaty rights by other means such as abandoning their membership in a treaty tribe and by becoming a member in a non-treaty

purposes of this petition which invites this Court to make an erroneous factual assumption.

A. The Issue presented by Colville's Motion to Intervene was whether Colville was a successor in interest to rights under the Yakima and Nez Perce treaties and the District and Circuit Courts both ruled squarely on that issue.

In its petition, Colville seeks to have this Court examine an issue that was never before either of the lower courts. Colville states that issue as being "whether Indian tribes which are signatories to a treaty with the United States lose their treaty-protected off-reservation fishing rights, *sub silentio*, by failing to move to the reservation created by the treaty . . . " Petition, p. 5. Colville's Motion to Intervene in this case was premised upon a claim that Colville was a successor in interest to rights under the Yakima and Nez Perce treaties. "[C]olville filed a complaint in intervention seeking injunctive relief and a declaration that it is the successor in interest to the Wenatchi, Entiat, Chelan, Columbia, Palus and then Chief Joseph Band of Nez Perce Indians, and as such, it is entitled to exercise Columbia River off-reservation fishing rights

---

tribe. Despite Colville's attempted definition, Petition p. 3 at note 2, its constituent entities that formed the basis for its claim in this case were not tribes and the District Court found accordingly. "[C]olville does seek to establish a direct link to the 1855 treaties by tracing members of identifiable groups within the Colville Reservation . . . to treaty signatories." Petition, Appendix C, p. 39a. *See also*, Petition, Appendix C, pp. 24a, 27a - 28a. Colville did not challenge this characterization in its appeal to the Ninth Circuit in this case.

reserved" in the Yakima and Nez Perce treaties. Petition, Appendix C, pp. 15a - 16a.

Judge Marsh was deliberately precise in defining the issue before him in the district Court. He first eliminated three distinct issues which he held were *not* before him. *Id.* at 31a. He then stated:

> I find that the issue before me is whether the Confederated Tribes of Colville Reservation may exercise authority, as a separate Treaty Tribe, to administer or regulate off-reservation treaty fishing rights based upon the fact that some of its members can trace their ancestry to parties to the Yakima or the Nez Perce Treaties of 1855.
>
> *Id.*

In order to resolve this issue, Judge Marsh concluded that he "must first consider who can hold treaty rights . . . " *Id.* He reviewed case law from this Court and the Ninth Circuit holding that treaty rights belong to tribes as opposed to individuals and that the regulation of treaty rights is an "internal affair" of the tribal entity, and then noted that the Ninth Circuit has held that any "tribe" which seeks to assert treaty fishing rights as a treaty signatory must first establish treaty tribe status. *Id.* at 32a. After an extensive review of the law and facts, Judge Marsh made a specific holding:

> Based on the foregoing, I find that the Colville Confederated Tribes has failed to establish that it is the successor Indian government and present day holder of treaty rights reserved (under Yakima and Nez Perce Treaties).
>
> *Id.* at 44a.

This finding was not premised upon the fact that a treaty tribe did not move to the reservation created by a treaty to which it was a party. Rather, the court came to this conclusion because Colville failed to meet its burden of proving the "unique" argument it urged before the district court.[6]

Similarly, the Ninth Circuit also focused upon the specific issue of whether Colville had established treaty tribe status:

> [T]he critical issue, however, is whether the (Colville constituent) tribes have shown that they have maintained political cohesion with the tribal entities created by the treaties and receiving fishing rights. For the reasons discussed below, we conclude that they have not. We therefore affirm.
>
> Petition, Appendix A, p. 8a.

The same fictitious issue presented by Colville to this Court was also urged upon the Ninth Circuit in Colville's Petition for Rehearing in this case. "The law of this Circuit is that treaty rights are not lost because a tribe does not move to and affiliate on the reservation in its treaty," Colville Petition for Rehearing, p. 4. Colville's Petition for

---

[6] Colville attempted to combine elements derived from *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990) and *United States v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1979) and contended that the "constituent tribes" maintained distinct tribal structures within the Colville Confederacy and, at the same time, that they merged into that confederacy. The district court noted that "such an amalgam of arguments . . . becomes inconsistent with itself." Petition, Appendix C, p. 39a.

Rehearing was denied, Petition Appendix D, pp. 66a - 67a, and the Ninth Circuit issued a separate order amending its original opinion, in part, by the addition of the following language:

> Failure to move onto the reservation is not the determinative factor in deciding whether a group has maintained treaty rights. Rather, it is only one consideration relevant to an essentially factual inquiry - *i.e.*, whether a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe. *See Washington II*, 641 F.2d at 1372-73.

Petition, Appendix B, pp. 13a - 14a.

Thus, the Ninth Circuit took extraordinary steps to make it very clear that its decision did not turn upon the failure of a tribe to move onto a reservation.

Both the district court and Ninth Circuit focused upon the determination of whether Colville had met its burden[7] of proving that it had achieved treaty tribe status. Both courts found that it had not. These courts have maintained and exercised continuing jurisdiction over *U.S. v. Oregon* and the treaty issues that have arisen within this case for more than 26 years. They made no error in deciding that Colville was not a successor in interest to the treaty rights of the Yakima and Nez Perce Tribes.

---

[7] Petition, Appendix C, p. 34a.

B. Colville's issue statement invites this Court to make an erroneous factual assumption.

By asserting that an Indian Tribe does not lose its treaty-protected off-reservation fishing rights by failing to move to the reservation created by the treaty, Petition, p. 5, Colville implies that the facts of this case are consistent with that statement. They are not. Colville attempts to elevate its six constituent entities to treaty tribe status simply by defining them as treaty tribes. Petition, p. 3, 6. They are neither tribes nor parties to treaties. As the district court found, the groups that Colville claims as treaty tribes were not tribes but groups of individuals who can trace ancestry back to the Yakima and Nez Perce Tribes. "Colville does seek to establish a direct link to the 1855 treaties by tracing members of identifiable groups within the Colville Reservation . . . to treaty signatories." Petition, Appendix C, p. 39a.

The absence of tribal status is most obvious with regard to the Chief Joseph Band which, by its very title, was never a tribe, but one of sixteen or seventeen bands of the Nez Perce Tribe. Petition, Appendix C, p. 45a. Colville further perpetuates this distortion by portraying the Chief Joseph Band that went to the Colville Reservation as the same Chief Joseph Band that had representatives who signed the 1855 Nez Perce Treaty. Petition, p. 3. That is not true. The original Nez Perce Band known as the Wal?wama[8] Band had Old Chief Joseph as one of its leaders. Petition, Appendix C, p. 47a. After the Nez Perce

---

[8] Phonetic spelling of original Nez Perce Band name. *See*, Petition, Appendix B, p. 47a.

War of 1877, that band as originally constituted, had ceased to exist. *W.W. Wolverton v. United States*, 29 Ct. Cl. 107 (1984). The group of survivors which included people from several bands and possibly from other tribes also came to be known as the Chief Joseph Band because Young Joseph, son of Old Joseph, had emerged as a spokesman for that group. Petition, Appendix C, pp. 53a - 55a.

Colville's contention that the Chief Joseph Band continues to exist at Colville is contrary to their own position in previous litigation. In *The Confederated Tribes of the Colville Reservation as Representative of the Joseph Band of the Nez Perce Tribe v. The United States*, 25 Indian Claims Commission 99, Docket No. 186 (1971), the primary claim urged by the Colville Tribe was for damages based upon the *"destruction of the Joseph Band as a viable economic, social and political entity." Id.* at 102 (emphasis supplied). It was ultimately ruled that this claim did not state a cause of action cognizable under the Indian Claims Commission Act, *Id.* at 105, but it reflects the common understanding that the original Joseph Band ceased to exist long ago.

While the situation regarding the Yakima Tribe is factually more complex than that of the Nez Perce, the district court found, on complex and disputed facts, that Colville had failed to establish that any of the alleged "Yakima groups" had gone to Colville as groups retaining Yakima Treaty rights. As Yakima correctly reflects in its brief in opposition, the court's decision on this issue is supported by substantial evidence, and the Ninth Circuit's opinion accurately reflects that the decision was based upon factual findings supported by the record in

accord with the long established law of the Circuit and this Court.

As the district court correctly found, the Yakima and Nez Perce Tribes are the parties to the treaties at issue here. "I find that the *tribal entities* which are reflected in the Yakima and Nez Perce treaties of 1855 are the present day Confederated Tribes and Bands of the Yakima Indian Nation and the Nez Perce Tribe of Idaho." Petition, Appendix C, p. 41a. From this, the Court concluded that the Nez Perce Tribe and Confederated Tribes and Bands of the Yakima Nation are the only duly recognized "tribal" organizations that may administer or regulate the exercise of fishing rights by treaty tribe members. *Id.*

Colville's characterization of issues in its petition is incorrect and misleading.

CONCLUSION

The district court, citing *United States v. Washington*, 641 F.2d 1368, 1371[9] (9th Cir. 1981), noted that the "sole purpose" of requiring proof of tribal status is to ensure that the group asserting treaty rights is the group named in the treaty. Petition, Appendix C, p. 32a. That purpose was met in this case. The Confederated Tribes and Bands of the Yakima Indian Reservation and the Nez Perce Tribe are the tribal entities named in the 1855 treaties and, as such, are the only tribes entitled to exercise rights reserved in those treaties.

[9] The citation here should be to page 1372.

Colville's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DOUGLAS NASH
Office of Legal Counsel
P.O. Box 305
Lapwai, Idaho 83540
(208) 843-7355

Attorney Respondent
Nez Perce Tribe

May 4, 1995

HOWARD G. ARNETT
KARNOPP, PETERSEN,
NOTEBOOM, HUBEL,
HANSEN & ARNETT
Riverpointe One
1201 N.W. Wall Street,
Suite 300
Bend, Oregon 97701-1936
(503) 382-3011

Attorney for Respondent
Confederated Tribes and
Bands of the Warm Springs
Reservation of Oregon